IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 11 of 1999
in
SPECIAL CIVIL APPLICATION No 1776 of 1998
to
LETTERS PATENT APPEAL No 75 of 1999
with
CIVIL APPLICATIONS No 47 & 3055 to 3118 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT Sd/-
and
Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 YES; 3 to 5 NO

GUJARAT AGRICULTURAL UNIVERSITY
Versus
ALL GUJARAT KAMDAR KARMACHARI UNION

Appearance:
1. LETTERS PATENT APPEAL No. 11 of 1999
MR DG CHAUHAN for Appellant No. 1
MR TR MISHRA for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT

and

MR.JUSTICE D.H.WAGHELA

Date of decision: 22/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE D.H.WAGHELA)

1. This group of 65 Letters Patent Appeals is preferred from a common judgment of this Court, whereby, 65 petitions of the appellant challenging the award of the Industrial Tribunal, Ahmedabad were dismissed. By the award of the Industrial Tribunal, the appellant University was directed to pay to the respective original complainants wages for the extra weekly holidays as also for the eleven days of unpaid Diwali holidays imposed upon them. It further directed not to give any extra leave of absence without pay in a week. These directions in favour of the respective complainants before the Industrial Tribunal were subject to the condition that only such of the complainants as were fulfilling the conditions of the settlement dated 22.8.1980 would be entitled to the benefits. The cause of the complaints or the genesis of the controversy lay in the adoption by the University of a new schedule of work in 1991 under which there was to be general holiday on the 2nd and the 4th Saturday and also eleven holidays during Diwali festivals. The complainants being daily wagers and their demands and disputes for regularization being pending, the aforesaid changes were challenged under Section 33-A of the Industrial Disputes Act, 1947 (`the Act' for short) as being unfair, illegal and prejudicial.

2. After appreciation of the evidence on record, the Industrial Tribunal found that the fixed number of days on which work was given to the daily wagers was an essential condition of service; that the complainants were workmen concerned in the main dispute for regularization pending as Reference No.463 of 1991; that the alteration was also in regard to a matter connected with the dispute and that the change was illegal. The conclusion that the complainants-workmen were entitled to work for six days in a week was based upon the fact that there had been a binding settlement dated 22.8.1980 arrived at in accordance with Section 2 (p) and registered under Section 12 (3) of the Act under which a daily wager was, after working for a stipulated number of days in the preceding three years, entitled to regularization and to work for six days in a week. Although that settlement was to remain in operation for a period of three years under an express condition

contained therein, the terms thereof continued to bind the parties till a new settlement or award on the same subject-matter would come into operation. There was no dispute about the fact that the trade union of workmen had terminated the aforesaid settlement in the year 1983 in order to raise demands, but during the pendency of conciliation and adjudication thereof, the appellant University continued to have only one holiday in a week, till the circular dated 22.6.1991 was issued imposing the 2nd and 4th Saturday as holiday as also eleven holidays during Diwali festival. These changes obviously and necessarily hit the daily wagers like the complainant-workmen in two ways. By imposition of extra holidays, they lost their daily wages for those holidays and in their pending case for regularization in service, lesser number of days worked in a year would be shown.

2.1 As against the above predicament of the workmen, the appellant relied upon the fact that the whole establishment and the entire permanent staff observed holidays during the 2nd and 4th Saturdays and the Diwali holidays due to which casual employees working on daily wage basis could not be provided with work, and that, by their status as daily wagers, they could not be paid wages for the holidays during which they were not required to work.

2.2 It must be stated at this stage that the controversy centered around imposition of extra holidays and deprivation of work and wages to these daily wagers and the Tribunal was, therefore, not called upon to decide discontinuance of work for any other cause, such as, absence of work or the workman. It must also be noted that what was being asserted by the workmen and alleged to have been violated by the appellant was a right to have only one unpaid holiday per week. What obviously hurt the workmen was not only the compulsory loss of wages but the loss of number of days on which they could work.

3. The original complaints of the respondents were filed under Section 33-A of the Act, which reads as under:

> "33-A Special provisions for adjudication as to whether conditions of service, etc. changed during pendency of proceedings -
>
> Where an employer contravenes the provisions of Section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National

Tribunal, any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner-

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of such industrial dispute; and

(b) to such arbitrator, Labour Court,Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly."

3.1 Thus, the foundation of the complaint under Section 33-A could only be contravention of the provisions of Section 33 during the pendency of the proceedings. The relevant part of Section 33 of the Act reads as under:

"33 Conditions of service, etc. , to remain unchanged under certain circumstances during pendency of proceedings:-

(1) During the pendency of any conciliation proceeding before a Conciliation Officer or a Board of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or

(b) for any misconduct connected with the dispute.....

save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman-

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) .....

Provided that.....

(3) ....
(4) ....
(5) .... "

4. The Tribunal having arrived at positive findings of fact regarding pendency of the proceedings before the Tribunal in respect of an industrial dispute, alteration in the condition of service to the prejudice of the workmen, the workmen being concerned in the dispute and the matter of number of days of work and wages paid being connected with the dispute, there was no escaping the conclusion that the provisions of Section 33 were violated insofar as no requisite permission of the adjudicating authority before which the proceedings were pending was even sought. Under such circumstances, the Tribunal assumed the jurisdiction and adjudicating upon the grievance, made the award and the qualified order in effect nullifying the impact of the change in respect of such of the complainants who had already completed more than 240 days of work during each of the preceding three years of service.

5. Mr. D.G.Chauhan, the learned counsel for the appellant vehemently argued that the alteration in the

conditions of service of the complainants squarely fell within the four corners of the provisions of sub-section (2) of section 33 insofar as the complainants, as daily wagers, had no right to demand work on any day and the appellant was under no obligation to employ them on continuous basis. What was sought to be submitted, in substance, was that the contract of employment of a daily wager was a contract of service for a day and employment on the next day was entirely at the mercy, convenience or requirement of the employer and availability of the workman for employment. Therefore, there was no question of alteration of such condition of service when the appellant imposed additional holidays by changing the calendar of working days, according to the submission. It was further submitted that even the alleged alteration in the conditions of service of the complainants was, for being in consonance with the terms of contract and unconnected with the dispute, expressly permitted by sub-section (2) of section 33 of the Act and did not require even ex post facto approval.

5.1 The learned counsel relied upon the following observations of the Apex Court in PUNJAB BEVERAGES PVT. LTD., CHANDIGARH v. SURESH CHANDA [AIR 1978 SC 995]:

> "11. It will, therefore, be seen that the first issue which is required to be decided in a complaint filed by an aggrieved workman under S.33-A is whether the order of discharge or dismissal made by the employer is in contravention of S.33. The foundation of the complaint under S.33-A is contravention of S.33 and if the workman is unable to show that the employer has contravened S.33 in making the order of discharge or dismissal the complaint would be liable to be rejected. But if the contravention of S.33 is established, the next question would be whether the order of discharge or dismissal passed by the employer is justified on merits. The Tribunal would have to go into this question and decide whether, on the merits, the order of discharge or dismissal passed by the employer is justified and if it is, the Tribunal would sustain the order, treating the breach of S.33 as a mere technical breach. Since, in such a case the original order of discharge or dismissal would stand justified, it would not be open to the Tribunal, unless there are compelling circumstances, to make any substantial order of compensation in favour of the workman, In fact in Equitable Coal Co.'s case (AIR 1958 SC 761) an

> order of compensation made by the Tribunal in favour of the workman was reserved (sic) by this Court. The Tribunal would have to consider all the aspects of the case and ultimately what order would meet the ends of justice would necessarily have to be determined in the light of the circumstances of the case. But this much is clear that mere contravention of S.33 by the employer will not entitle the workman to an order of reinstatement because inquiry under S.33-A is not confined only to the determination of the question as to whether the employer has contravened S.33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal."

On the above basis it was submitted that a clear finding of contravention of the provisions of Section 33 was not reached in the impugned award. Relying upon the observations of the Apex Court in BLUE STAR EMPLOYEES' UNION v. EX OFF. PRINCIPAL SECRETARY TO GOVERNMENT [(2000) 8 SCC 94], it was submitted that violation or contravention of the provisions of Section 33 of the Act would be the basic question that would arise for consideration and before giving any relief to an aggrieved employee, the Tribunal had to find out whether the employer's action fell within one of the prohibited categories of actions. The contravention of the provisions of Section 33 of the Act was the foundation for exercise of power under Section 33-A of the Act and if that issue was answered against the employee, nothing further survived for consideration.

5.2 Relying upon the observations made in an altogether different context of award of backwages in a Division Bench judgment of this Court in THE RANGE FOREST OFFICER v. NIRUBHA JILUBHA PARMAR [1993 (1) GCD 65], it was argued that a `rojamdar' is a person who may or may not be offered work every day and he would not be entitled to any wage for the day on which no work was offered to him or when he remained absent. Thus, the two-fold submission of the appellant was that there was no change in the conditions of service of the complainants and, therefore, the complaints under Section 33-A did not lie; and, even if it was held that there was a change in the conditions of service, the same was expressly permitted by the provisions of sub-section (2) of Section 33 of the Act.

5.3 It must be noted here that the ratio of the

judgment in PUNJAB BEVERAGES (P) LTD. (supra) cited by the learned counsel for the appellant is expressly overruled by the Constitution Bench of the Apex Court in JAIPUR ZILA SAHAKARI BHOOMI VIKAS BANK LTD. v. RAM GOPAL SHARMA & OTHERS [(2002) 2 SCC 244] with observations in the context of the provisions of Section 33 (2) (b) of the Act as under:-

"13. .....To put it in another way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33 (2) (b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33 (2) (b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33 (2) (b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33 (2) (b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or

inoperative, the employer may with impunity discharge or dismiss a workman."

5.4 The above ratio should apply a fortiori in the context of more stringent provisions contained in Section 33 (1) (a) where express permission of the adjudicating authority is made a condition precedent for altering to the prejudice of the workman concerned the condition of service in regard to a matter connected with the dispute in respect of which proceedings are pending. It would, therefore, follow that mere violation of the restrictive provisions of sub-section (1) of Section 33 shall vitiate the action of altering the condition of service and nothing more may be required to hold the alteration to be illegal and inoperative, if the provisions of sub-section (1) of Section 33 are applicable in the facts of the case.

6. Apparently, the provisions of sub-section (2) of Section 33 of the Act takes out from the prohibition imposed under sub-section (1) the alterations in the conditions of service in regard to the matters which are not connected with the pendente lite dispute, if they are otherwise in accordance with the standing orders or terms of contract of service. Therefore, it would be crucial to examine whether any alteration in the conditions of service was effected by the appellant and, if the answer is positive, whether it was in regard to a matter connected with the dispute. It is seen that the main dispute and reference during the pendency of which the conditions of service were allegedly changed was for regularization to secure the benefits of permanency in service. It was also the case of the complainants that they had completed 240 or more days of work in each of the three preceding years of their service and that on that basis they were entitled to be made permanent. Pending the adjudication of such dispute and demand, increase in the number of unpaid holidays and resultant reduction of the working days would necessarily be a matter connected with the dispute insofar as not only the record of number of days worked would be altered but there would be an effective reduction in the total wages to which the workman concerned would be actually entitled. It needs no elaboration that the demand and dispute for regularization in service based on continued employment under the employer arises to prevent sudden discontinuation and to claim benefits at par with regular employees so as to achieve stability and an equitable standard of living. While struggling to achieve that goal, if forced unemployment were thrust upon a labourer in the name of additional holidays, it cannot be said

that the change in condition of service was in regard to a matter which was not connected with the dispute.

6.1 The contention that even a direct denial of work undisguised as a holiday, was no change in the condition of service for a daily-wager is required to be considered in the context of the peculiar facts of this case. It would be hazardous and illogical to jump to the conclusion that the essential condition of service of a `daily wager' is always that he has no right to work or demand employment from the employer. The words "daily-wager" or "daily rated" in relation to an employee literally connotes the method of counting his wages on the basis of days of working. It has nothing directly to do with the tenure or terminability of employment. There is no presumption that the contract of service between a daily rated employee and his employer is for employment for a day. The intention or understanding of the parties as regards tenure of employment can be gathered from the express conditions of service, written or oral, or, in absence thereof, from the surrounding circumstances and the actions of the parties. In the instant case, there was evidence before the Tribunal that many workmen were, due to the nature of work, required to be employed even on weekly holidays and the tradition of only one weekly holiday was consistently followed in respect of the daily-rated employees. And, thus, many of such employees could complete 240 days of work in a year before the impugned alteration was introduced with an express direction to see that the employees employed after 22.3.1991 did not complete 240 days of work within a year. In such circumstances, if the employer is allowed to plead, even in absence of evidence of any express condition of employment or appointment, that even after working for more than 240 days in each of three or more years of service, the workmen, only on account of being daily wager, could be denied employment on any number of days at the sweet will of the employer under an implied term of contract, it would be nothing but a travesty of justice.

7. In the facts of the present case, if the conditions and stipulations of the settlement dated 22.8.1980 between the appellant and its workmen had continued to be operative, the complainant-workmen would have been entitled to become permanent as soon as they completed three years of continuous service and would have been entitled to work for six days in a week as long as they would have continued to be paid wages on daily-rate basis. That having not happened and the workmen having been required to approach the Industrial

Tribunal by way of reference, which was pending, the benefit which would have accrued to the complainants by virtue of the settlement or by continued following of the practice established by the settlement could not have been taken away by the appellant without even making an application for permission, without any notice of change and without ensuring any payment for such holidays imposed upon the complainants. Therefore, adjudicating the matter as an industrial dispute, the Industrial Tribunal was right and fully justified in awarding wages for such forced holidays. Having regard to the basis of the claim of the complainants, the Tribunal has also taken care to see that only such of the complainants who were fulfilling the conditions stipulated in the settlement dated 22.8.1980 were to have the benefits of the order. That means, only such of the complainants who had completed 240 days of service in each of the three preceding years were awarded wages for the extra holidays declared on 2nd and 4th Saturdays and for the holidays of 11 days on Diwali festivals. We find the impugned directions to be eminently just and reasonable and within the discretion and jurisdiction of the Industrial Tribunal, requiring no interference by this Court. We also find that the Tribunal has, in fact, recorded a clear finding that while effecting the change in the conditions of service of the complainants, the provisions of Section 33 were violated. We further hold that the condition of providing work to the complainants for six days in a week prevailed before the change which was prejudicial and illegal and that the subject-matter of change was connected with the dispute which was pending.

8. The learned counsel for the appellant submitted that the directions in the award were capable of being misinterpreted to claim wages for all days of absence. The misapprehension of the appellant is, therefore, required to be removed by a clarification that, reading the impugned award and order in its proper context and perspective, the order to pay and mark presence for all the extra unpaid holidays should mean counting as the day worked and payment of wages for only the additional weekly holidays declared on account of the 2nd and 4th Saturday and it should not be taken to mean that the appellant is required to pay for and mark presence in respect of other days of absence occasioned due to absence either of the workmen or the work. The second direction in respect of payment of wages and counting presence for eleven days of Diwali holidays is sustained and requires no clarification. The third direction not to give more than one weekly holiday in future is required to be clarified to mean that even in case of

extra holidays being declared on 2nd and 4th Saturday, the respondents shall be entitled to wages for such extra holiday and have the day counted as the day worked. The condition subject to which the above benefits are granted is also sustained and requires no clarification.

9. On the grounds and for the reasons stated hereinabove and subject to the above clarifications, we dismiss the appeals for having no substance, and award, by way of costs, Rs.250/- to the respondent in each of the appeals with the direction that the amounts due under the Tribunal's award shall be paid to the respondents within two months from today. Notice is discharged. No order in the Civil Applications.

10. Before parting with the judgment, we have to mention that, in the industrial dispute referred in the year 1991, the complaints of the respondents for the illegal change appear to have been filed in the years from 1991 to 1997 and disposed by the Tribunal in August 1997, even as the original main reference remained pending. Had the main reference for regularization in service been decided within a reasonable time, the aforesaid directions would have in all probabilities merged into the main relief. The learned single Judge has, while dismissing the petitions by the impugned judgment, directed disposal of the main reference on top priority basis and before the end of the year 1998. It appears from the record of these appeals that after they were filed in January 1999 along with the applications for stay, they have remained at the admission stage till now. And, it is not stated whether the main reference is by now heard and disposed of or not. On the other hand, the appellant University has written a confidential letter dated 24.10.1997 (a copy of which is annexed to the main appeal) immediately after the impugned award, to the Secretary of the concerned Department of the State Government to convey that the University should be exempted from the provisions of the Industrial Disputes Act by bringing into force the amended definition of "industry" as given in Section 2 (j) of the Act, for the reason that it was required to repeatedly appear in so many cases in Labour Courts, Industrial Tribunal, the High Court and the Supreme Court which involved advocates' fees and expenses and payment of huge arrears due to adverse decisions. In such state of affairs, it would be for the appellant University to closely examine the `cost-benefit ratio' of the spiral of this wholesale litigation to find out whether the cost has been commensurate with the likely benefit or whether the cost has far exceeded the amounts which the original

complainant-workmen would have been paid after or without taking work, if the change to their prejudice was not effected at all. We are constrained to point out this poignant poser as the appellant, according to the aforesaid letter, ultimately shifts the burden of litigations and arrears to the State, i.e. the public exchequer.

Sd/-

(J.N.Bhatt, J.)

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)